STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2011
v	No. 294065 Washtenaw Circuit Court
BENJAMIN OCTAVIO ARREGUIN, Defendant-Appellant.	LC No. 08-002113-FH

Before: MURPHY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age).[1] We affirm.

The conviction arose from an allegation that defendant engaged in sexual contact with the eleven-year-old daughter of his girlfriend. The complainant testified that she was sitting on a couch on defendant's lap one evening while her friend was on the other end of the couch. She stated that she fell asleep, awoke at approximately 2:00 a.m., and felt defendant's fingers inside her underwear touching her "private area." Defendant testified that no improper touching took place.

Defendant first argues that the prosecutor improperly offered lay testimony to bolster the credibility of the complainant. Specifically, defendant objects to the complainant's mother's testimony that the complainant "told me that [defendant] touched her" and that the complainant was crying and "extremely upset and just devastated" while saying this.

This issue was not preserved, and therefore review is under the plain-error doctrine. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009). For reversal to be warranted, there must have been a clear or obvious error that affected defendant's substantial rights, i.e., that affected the outcome of the lower-court proceedings. *Id*. Also, "we cannot find error requiring

[1] The complete record has not been provided on appeal and thus defendant's sentence is not apparent.

reversal where a curative instruction could have alleviated any prejudicial effect." *People v Unger*, 278 Mich App 210, 234; 749 NW2d 272 (2008) (internal citation and quotation marks omitted).

Defendant contends, inaccurately and inexplicably, that the mother "offered no evidence." Clearly, the mother did offer evidence, testifying about numerous issues such as her relationship with defendant and the events leading up to the incident. Defendant then contends that the challenged testimony consisted of an inadmissible prior consistent statement. However, we note that "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Given the prosecutor's admonition to the mother that he did not "want to know the details of what [the complainant] told you," we cannot find that the prosecutor acted in bad faith in eliciting the testimony. Moreover, the witness merely stated that the complainant told her "that [defendant] touched her." Given the victim's detailed testimony about the touching, as well as her testimony that she told her mother about the incident, we cannot discern how the mother's cumulative testimony affected defendant's substantial rights. With regard to the testimony about the complainant's demeanor, this was pertinent testimony relating to the complainant's credibility. Contrary to defendant's assertion on appeal, defense counsel had indeed insinuated that the complainant was not credible during his cross-examination of her, and credibility was in issue.

Defendant next argues that the prosecutor improperly admitted "bolstering" testimony of Detective Craig Raisanen. Raisanen testified about aspects of an interview that took place between the child and a social worker, specifying the protocol that was followed. Raisanen testified that the goal of the forensic interview protocol is "to get to the truth," and he answered "[y]es" when asked whether "[e]verything was done properly in this case." Defendant contends that Raisanen "performed an 'end run' around the rule that forbids him from saying the victim is telling the truth." Defendant also objects to Raisanen's testimony that "a delayed disclosure is typical."

This issue was preserved. The general test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Defendant, in the context of this issue, also asserts that the trial court erred in allowing the testimony. We review the admission of evidence for an abuse of discretion. *Dobek*, 274 Mich App at 93.

The prosecutor's challenged actions were nothing more than good-faith attempts to admit evidence and did not constitute misconduct. *Id*. at 70. Moreover, the trial court did not abuse its discretion in allowing the evidence. The testimony about the forensic interview protocol was relevant to helping the jury assess the victim's credibility, see *People v Tesen*, 276 Mich App 134, 144; 739 NW2d 689 (2007), and Raisanen did not state that he had personal knowledge that the complainant testified truthfully. Moreover, Raisanen's testimony that "delayed reporting is typical" was again relevant to help the jury assess whether it was reasonable for the complainant to have waited until three days after the incident to inform her mother about it.

Defendant next argues that the prosecutor improperly bolstered the testimony of the complainant during closing arguments. Defendant objects to the prosecutor's statement that the goal of the forensic interview protocol is "to get a truthful statement using those techniques

designed to do that." He further objects to the prosecutor's statement that "[t]here is no way" that a "sophisticated trap could be set out of this [sic] eleven year old girl." Finally, he objects to the statement that the complainant could not have "put together this complicated series of falsehoods to implicate this man that she likes and essentially conspire with her mother to . . . make this happen."

This issue was not preserved and is thus subject to review under the plain-error doctrine. We find no plain error.

Prosecutors are afforded great latitude in their arguments and may argue the evidence and reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In mentioning the forensic interview protocol, the prosecutor was properly commenting on the evidence introduced. In the remaining challenged comments, the prosecutor was simply making proper inferences based on the evidence. In his examination of defendant, defense counsel tried to insinuate that the complainant fabricated the allegations because she had not been getting along well with him. When the prosecutor's remarks are reviewed in context, it is apparent that the prosecutor was simply making the inference that it was unlikely for an eleven-year-old girl to have entrapped defendant with false allegations, especially when defendant later testified that "we actually got along pretty good."

Defendant next argues that the prosecutor improperly asked defendant, repeatedly, to comment on the credibility of prosecution witnesses. Defendant alleges prosecutorial misconduct and also contends that the trial court erred by allowing the questioning.[2] This issue is analogous to the situation in *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). We agree that some of the prosecutor's questioning was improper, as was the similar questioning in *Buckey*, *id*. at 7 n 3. However, "the substance of the exchange indicates that defendant dealt rather well with the questions [and w]e fail to discern how he was harmed by the questions." *Id*. at 17. We cannot find that defendant was denied a fair trial as a result of the questions.

Defendant contends that the errors complained of above resulted in cumulative error requiring reversal. We disagree. Any errors that did occur did not deny defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). No serious prejudice has resulted. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Defendant next argues that defense counsel rendered ineffective assistance by failing to read the transcripts of the complainant's forensic interview and of the preliminary examination.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been

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[2] Defense counsel objected to the line of questioning and the trial court overruled the objection, stating, "Well I'll give him some latitude. It's cross-examination."

> different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted; emphasis in original).]

Defendant states that in the forensic interview, the complainant mentioned having told her friends M. and S. about the incident. In closing arguments, trial counsel stated, "And there's no mention to the police that she told [S.] or anybody else. We hear it for the first time here in the courtroom." Defendant contends that this is evidence that defense counsel failed to read the interview transcript and therefore failed to prepare properly for the case. We disagree that this issue requires reversal. First, it is not evident from defendant's assertions that counsel failed to read the transcript. He stated, "there's no mention *to the police* that she told [S.] or anybody else" (emphasis added). This was not a definitive statement regarding the forensic interview. Secondly, defendant does not indicate how a reading of the transcript (assuming, arguendo, that defense counsel had indeed failed to read it) would have affected the outcome of the proceedings. Defendant states that counsel could not effectively cross-examine Detective Raisanen without having read the transcript, but he does not set forth how the cross-examination should have differed.

At the preliminary examination, the complainant testified that after she felt defendant's fingers resting on her private area, she awoke him. Defendant states that this tended to negate mens rea and that counsel must not have read the preliminary examination transcript because he did not explore this point further at trial. We again disagree that this issue requires reversal. Defendant's assertions do not establish that counsel failed to read the preliminary examination transcript.[3] The complainant testified at trial that defendant "[a]cted like he was asleep" after she awoke with his hand inside her underwear. Defendant testified at trial that both children were asleep when he awoke on the evening in question and that he simply left them and went to bed. He stated "[a]bsolutely not" when asked if he had at any time that night touched the complainant inappropriately. It is evident that defense counsel pursued a strategy of arguing that no touching occurred at all, not that an inadvertent touching occurred while defendant was asleep. This was a reasonable trial strategy that we will not second-guess. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant next mentions that there was evidence that his trial counsel was intoxicated during the trial. Defendant's mother submitted an affidavit indicating that counsel smelled of alcohol and appeared intoxicated on the morning of the second day of trial. Another witness, a jail volunteer, submitted an affidavit stating that counsel appeared intoxicated on the second day of trial.[4] Defendant contends that the trial court should have granted an evidentiary hearing to

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[3] Also, contrary to defendant's implication, defendant's attorney at the preliminary examination did argue against the bindover, stating that if any touching occurred it was unintentional.

[4] The trial court, in denying defendant's motion for a new trial or for an evidentiary hearing regarding ineffective assistance of counsel, stated that it "saw no evidence of any lack of

explore this issue further. We once again find no basis for reversal. Similar to *People v Storch*, 176 Mich App 414, 425-426; 440 NW2d 14 (1989), defendant does not adequately allege that any alcohol problem rendered counsel's representation deficient. A hearing regarding ineffective assistance of counsel should be granted if a defendant has "set forth . . . facts that would require development of a record to determine if defense counsel was ineffective . . . ." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). We find that defendant did not adequately set forth such facts.

Defendant lastly argues that the trial court erred in denying his motion for a mistrial. We review this issue for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

During deliberations, the jurors sent a note asking a question. According to defense counsel's representation after the reading of the verdict, the jurors asked, "[if] defendant had been found guilty of previous sexual misconducts would that have been admissible as evidence[?]" After a conference in chambers that was not on the record, the court provided a note in return that stated, "This is not for you to decide. All the evidence is before you." Defendant contends that this instruction was erroneous and misleading because, under MCL 768.27a, prior sexual offenses against a minor were indeed admissible in this case.[5] Defendant contends that the jury should have been instructed that defendant had no prior convictions. We find no basis for reversal. The instruction as given was accurate, and it "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

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preparation on [counsel's] part" and "certainly saw no evidence of any intoxication . . . ." The court noted that counsel had approached the bench a number of times and that the court did not at those times notice any signs of intoxication.

[5] It does not appear that the jury asked specifically about offenses against minors.